COMMONWEALTH OF MASSACHUSETTS
BEFORE THE
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own motion regarding circumstances under which an electric company must seek Department approval pursuant to G.L. c. 164, § 72 prior to transmission line construction or alteration.	D.T.E. 04-92

COMMENTS OF THE
WESTERN MASSACHUSETTS ELECTRIC COMPANY

Western Massachusetts Electric Company ("WMECO" or "Company") appreciates the opportunity to comment to the Department of Telecommunications and Energy ('Department") on the guidelines to be used for determining when an electric company or other covered entity must apply to the Department for approval, under Section 72 of Chapter 164 of the General Laws, for approval of the construction or alteration of a transmission line. WMECO will be pleased to participate in any technical sessions or hearings that the Department may wish to hold on this subject.

WMECO recognizes that Section 72 does not establish length, voltage, or other threshold requirements for Department review and that it would be highly preferable for both the Department and the covered entities to understand what projects need to be reviewed by the Department, and which projects need permits/approvals only from the other applicable state and local reviewing bodies.

In addition, WMECO recognizes the advisability of standard guidelines for the content of petitions filed under Section 72. These filing guidelines will provide a basis for the Department's review. Such guidelines should reflect the clear differences between the more limited reviews called for under Section 72 and the more extensive review required by the Energy Facilities Siting Board under Section 69G *et seq.*[1]

In reply to the Department's specific questions, WMECO offers the following responses:

A. Nature of Transmission Lines Subject to Section 72

Section 72 provides for the review of "a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it...."

Question 1

Does this language encompass all types of transmission lines that a transmission provider might construct, or are certain types of lines (for example, substation tap lines) excluded from this definition? Please explain.

Answer

Taken to the extreme, the language of Section 72 could be read to encompass not only all types of transmission lines, including overhead or underground construction types and tap lines to substations, that a transmission provider might construct, but also lines which transmit power at distribution voltages. However, WMECO does not believe such an expansive reading was intended by the Legislature or makes sense today. Based on the wording of the statute, distinctions must be drawn so that the Department is not called on to review scores of relatively insignificant electric line projects that are already subject to governmental review. Otherwise,

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1 The Energy Facilities Siting Board is "within the Department, but not under the supervision or control of the Department" (G.L. c. 164, § 69H).

much of the resources of the Department and the electric companies would be expended in unnecessary Section 72 transmission line reviews to the detriment of their other statutory and regulatory responsibilities.

WMECO believes that the appropriate distinction is to subject new transmission lines to the approval process (with some exceptions, as discussed in further answers). This interpretation tracks the language in Section 72 that indicates the purview of the section is over lines "providing or seeking to provide transmission service." An entity providing or seeking to provide transmission service would do so by constructing and using 'transmission' lines. Distribution lines, on the other hand, should not be subject to a mandatory review. Distribution lines are far more commonplace, are local by their very nature, and their construction generally raises few issues. In addition, as the Department is aware, the lack of a mandatory Section 72 approval for distribution lines does not mean that these lines avoid regulatory scrutiny. On the contrary, distribution lines are subject to review by other governmental entities.

As explained in its responses, below, WMECO believes there are certain characteristics of transmission lines that should lead to a mandatory Section 72 review. In addition, however, WMECO concurs with the suggestion of the Department in this question that certain types of facilities, such as a generator feed lines, do not appear to fit the definition of "electricity for distribution in some definite area or for supplying electricity to itself or to another electric company" and are therefore exempt from any mandatory filing requirement.

Question 2

Section 72 appears to distinguish between "a line for the transmission of electricity" and other electric lines. Are the Department's two orders distinguishing transmission and distribution facilities in response to FERC Order 888 (Classification of Transmission and Distribution Facilities, D.T.E. 97-93 (1998), and Western Massachusetts Electric Company, D.T.E. 03-71 (2004)) relevant to the question of which electric lines are subject to Section 72? Can you propose a clear formula that would distinguish transmission lines subject to Section 72 from distribution lines that would not be subject to Section 72?

Answer

The Department's two orders, D.T.E. 97-93 and D.T.E. 03-71, distinguishing transmission and distribution facilities for WMECO are relevant to the question of which electric lines are subject to Section 72 in the sense that they recognized a clear distinction between 'transmission' lines (and other transmission facilities) and 'distribution' lines (and other distribution facilities). Aided by these decisions, WMECO has established a clear delineation between transmission and distribution service and there will be few, if any, instances in which there will be any uncertainty whether a line is 'transmission' versus 'distribution.'

There is no mathematical formula for determining transmission versus distribution, but there are key determinants. For WMECO, a voltage of 69 kV or higher, and the manner in which the line is used in the Company's system are two key determinants.

Question 3

From a policy perspective, are there voltage, length or other considerations that should dictate when a Section 72 filing is required? If so, please explain.

Answer

Yes, there are public policy as well as legal considerations which the Department should use to make a determination of public convenience and necessity under Section 72 is or is not required for a new line. First, lines designed to operate at voltages of less than 69 kV are not transmission lines on the WMECO system and should not be subject to any mandatory filing requirements. Distribution class facilities typically are constructed along public routes and are constructed under the watchful eye of a town. Involving a section 72 review in such cases would be unnecessarily burdensome for both the company and the Department. Second, the statute refers to crossings of public ways, railroads, railways, navigable streams and tide waters. For lines that do not involve such crossings, it follows that no Section 72 filing should be necessary. This would avoid a filing in the instance in which there are minimal impacts, such as when a new

line (or relocation) is requested by a private party (for example, a large industrial customer) where the right-of-way is owned in fee by the private party. Third, lines designed to 115 kV specifications but operated for some time at a lower voltage should not be subject to a Section 72 requirement when the line is later converted to operate at the higher 115 kV voltage. Fourth, as indicated above, generator leads should be excluded from mandatory review based on the definition in the statute. Fifth, WMECO believes that it is reasonable to exempt from Section 72 review transmission lines that otherwise would require a filing if they are of a sufficiently short length. WMECO proposes that lines of less than 1000 feet be exempted.

The Department must exercise judgment in order to carry out the intent of the Section 72. In WMECO's opinion, the five points set out above strike the correct balance between the public's interest in having the Department review larger electric line projects and the reality that most electric line projects involve very minimal impacts and do not warrant the expenditure of significant time and resources at the Department's level. See the answer to Question B.1, below, for standards for altered lines.

Question 4

Could the Department exempt certain types or lengths of electric transmission lines from Section 72 review, while retaining the ability to authorize the taking of property by eminent domain for a certain line of that type or length, if necessary? If so, please explain.

Answer

As the Department's question appears to recognize, it is critically important that an electric company have recourse to eminent domain to build or alter a line that is otherwise in the public interest. It is uncertain, however, whether a line that does not go through a Section 72 public convenience certificate review can qualify for the eminent domain process of Section 72. The Supreme Judicial Court has suggested in *Sudbury v. Department of Public* Utilities, 343 Mass. 428, 433 (1962) that the right of eminent domain is dependent on obtaining a certificate of

convenience and necessity from the Department under Section 72. In order to be prudent, therefore, WMECO recommends that, in any guidelines issued by the Department, an electric company be given the right to apply for a certificate of public convenience and necessity under Section 72 for any electric line for which a grant of eminent domain is needed. That is, even though an electric line project does not trigger a mandatory Section 72 public convenience and necessity filing, an electric company would have the option to make such a filing. Under the current state of the law, any other outcome could lead to the inability to construct or alter needed electric lines in the Commonwealth.

Question 5

For transmission providers: What factors do you consider when deciding whether to seek Section 72 approval for a new transmission line? Why do you consider these factors? Have these factors changed over time, or have you historically relied on these factors in deciding whether to seek Section 72 approval of new transmission projects?

Answer

On a forward-looking basis, WMECO supports consideration of the factors discussed in previous answers. WMECO launched an expansive build of its transmission facilities in the 1970's; WMECO has not had occasion in the past twenty years or so to propose a new transmission line subject to Section 72 approval and hence our experience with these reviews is limited.

Question 5(a)

For transmission providers: What voltage levels are used in your service territory: (a) for the transmission of electricity for distribution in some definite area; (b) for supplying electricity to yourself or to another electric company or to a municipal lighting plant for distribution and sale; and (c) for transmission of electricity to a railroad, street railway or electric railroad, for the purpose of operating it? Are there instances in which any of the same voltage levels also are used for lines in your service territory that are clearly distribution circuits only?

Answer

a. With the exception of a 69-kV generator interconnection line for Cobble Mountain, WMECO's transmission lines in this category all operate at 115 kV.

b. Transmission at 115 and 345 kV is in use by WMECO for this purpose and for interconnections of independently-owned power plants to the transmission grid.

c. WMECO does not currently provide any transmission service to electric railways.

There are no instances in WMECO's service territory where a distribution circuit operates at a transmission voltage of 69 kV or above. There are, however, a few uses of former 69-kV transmission lines that currently operate as segments of 13.8-kV or 23-kV distribution circuits.

Question 6

For transmission providers with recent experience in Section 72 reviews: Please provide an estimate of the incremental expenses incurred when a transmission project requires a Section 72 review.

Answer

WMECO does not have direct recent experience with Section 72 reviews.

B. Transmission Lines with Altered Construction

Section 72 states, in part, that "[a]ny electric company, distribution company, generation company or transmission company or any other entity providing or seeking to provide transmission service may petition the [D]epartment for authority to...continue to use as constructed or with altered construction a line for the transmission of electricity...."

Question 1

Should this language be read as requiring companies to seek Section 72 approval for alterations to certain transmission lines, where eminent domain is not required for such alterations? If so, what types of alterations might require Section 72 approval, and what types should be considered routine maintenance, not requiring such approval?

Answer

This language should be read as requiring companies to seek Section 72 approval for material alterations to transmission lines (or upgrades of a line from distribution to transmission), even if eminent domain takings of land are not required for such alterations. However, in order for the alteration to be considered material and hence trigger a Section 72 review it should

change the basic nature of the line. For example, completely rebuilding a line which doubles the tower height and significantly increases the width of the ROW used would likely trigger a Section 72 review. However, alterations that involve reconductoring, converting a line built to 115kV specifications and later converted, changing the configuration or poles to provide higher capacity, and maintenance replacements of structures, conductors and components, with otherwise similar characteristics as before (same voltage, similar heights, same basic system function, little or no shifting or new vegetation clearing), should not trigger the need for Section 72 approval.

Factors that would suggest that a Section 72 filing may be necessary are:

(a) A project on a different or substantially expanded right-of-way ("ROW") or property;
(b) A project involves an increased design voltage;
(c) The heights or widths of any new structures for the line are substantially greater.[2] A substantial increase in height or width would be an increase of not less than 20 percent.
(d) The line is being changed to perform a expanded function in the transmission system;.
(e) The project requires new street crossing permits; and
(f) The project requires new land takings by eminent domain.

For both new and altered lines, the Department's guidelines also should take into account that at times lines have to be constructed or altered based on emergency conditions that do not allow for a lengthy prior review.

Question 2

For transmission providers: Have you ever sought Section 72 approval for alterations to an existing transmission line, except in the context of an eminent domain filing? If so, please provide recent examples. What factors do you consider when deciding whether to seek such approval? Why do you consider these factors? Are there other factors you think should be considered, going forward?

Answer

In its recent history, WMECO has not sought Section 72 approval for alterations to an existing transmission line because the Company has only undertaken relatively minor line

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2 By width, WMECO refers to the transverse width of the line (*i.e.*, the full width of the pole and cross arms).

alterations for some time. The Company gave written notice to the Department in December 1996 of a project to reconductor a 115-kV line, but did not seek Section 72 approval.

Question 3

For transmission providers: Approximately how many additional Section 72 filings would you make annually if Section 72 approval were required for all reconductoring of electric transmission lines? For reconductoring that required the replacement or relocations of a significant number of poles? For reconductoring that required replacement or relocation of all poles? For the relocation of a transmission line outside of the existing right-of-way?

Answer

In the "Western Massachusetts Electric Company 2004 Transmission Forecast for the Period 2004-2013", dated April 1, 2004, several 115-kV circuit segments in the Springfield-Ludlow area are identified as under study for possible upgrades by 2009, including 7.2 miles of underground 115-kV lines and sections of three overhead 115-kV circuits over a distance of about 19 miles. It is unlikely that reconductorings of these circuits would be the only requirement. However, these projects are not expected to include relocations outside of the existing right-of-way. Each of these circuit reconductorings would be candidates for a Section 72 filing or filings if such approval is required for all reconductorings and not just reconductorings that require significant numbers of structure replacements.

There may also be projects ahead to replace aging overhead shield wires above some transmission lines or to install fiber optic cables along transmission lines (*i.e.*, separate cables or fibers within a replacement overhead shield wire). The Company would anticipate that these projects would be exempt from Section 72 approvals.

There is also potential for short transmission line relocations, line and right-of-way, to accommodate interests of underlying land owners (*e.g.*, the Chicopee Landfill). Depending on the circumstances and extent of such relocations, the Company would expect most such projects to be exempt from Section 72 approvals.

C. Scope of Section 72 Proceedings

Question 1

Attached to this Request for Comments is a draft checklist, similar to the checklist used for zoning exemptions, which outlines the information that should be submitted as part of a Section 72 filing. Does the checklist accurately convey the scope of current Department proceedings with respect to Section 72 reviews? If not, what should be changed to accurately convey that scope? Would you recommend any changes to the current scope of the Section 72 review?

Answer

Because WMECO has not gone through a Section 72 review in some time other parties may be more qualified to determine whether the checklist accurately conveys the scope of current Department Section 72 proceedings. Whatever the case may be with respect to current Department practice, however, the Department's guidelines should reflect the differences in Section 72 from Siting Board "Facility" applications and from zoning exemption applications. In particular, Section 72 applications deal with smaller transmission projects (*i.e.*, typically those not covered by the more extensive requirements of Section 69G *et seq.* of Chapter 164). The smaller size of the project should be reflected in a commensurately more limited review, both in terms of data to be provided and time for the review. In addition, unlike the requirements of Section 69J for Siting Board projects, Section 72 does not require an inquiry into, for example, alternative approaches and environmental impacts. Accordingly, the guidelines and the Section 72 review should be based on the Section 72 language and not on the review conducted under other statutory sections.[3]

A particular concern with the second item of Part 4 of the proposed guidelines is that if a project has alternatives for routing or right-of-way expansion, and the line is therefore not fully engineered, it is impossible at the petition stage to accurately specify the easement to be taken

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[3] Also, it goes almost without saying that the Department should coordinate its review with other governmental agencies in order to avoid unnecessary duplication of effort and in order to conserve the Department's limited resources.

over each property. A change should be made to allow this specification to follow a route decision.

In addition, the guidelines do not allow for a situation where an eminent domain action is needed for a transmission project that might otherwise be exempt from a Section 72 review process. For example, an eminent domain action could be needed simply to establish rights needed to prevent a property owner from doing something that was unanticipated when the right-of-way was first obtained, but which would make an existing line on the right-of-way noncompliant with safety codes (*e.g.,* conversion of pole-line rights to a specified easement width).

Question 2

As discussed above, there have been differences of opinion in the past as to whether G.L. c. 164, § 72 requires that a company seek Department approval to construct any new transmission line, or whether the Department's approval is necessary only when an eminent domain taking is necessary for such construction. Given the Court's holdings in Sudbury and BECo, and the amendments to G.L. c. 164, § 72 adopted as part of Chapter 249 of the Acts of 2004, is it still possible to argue that Department approval should be required only when an eminent domain taking is necessary for the construction of a transmission line? If so, please explain.

Answer

In *Boston Edison v. Sudbury*, 356 Mass. 406 (1969) (the "Order") the Supreme Judicial Court examined Boston Edison's contention that Chapter 164, section 72, does not require an electric company to obtain a certificate of public convenience and necessity over an easement the electric company already controls (Order, p. 411). On that narrow question, the court, citing the earlier *Sudbury v. Department of Public Utilities* proceeding (343 Mass. 428), ruled that it interpreted section 72 as requiring two separate filings. One filing is required for an electric company wishing to build a transmission line (Order, p. 413). A second filing is required if there is need to take land by eminent domain (Order, p. 413). The court stated the second filing would be unnecessary if no eminent domain taking is necessary. Therefore, based on the facts

presented in the *Boston Edison* case dating back 35 years ago, it does not appear that eminent domain is a relevant criterion for the submission of a mandatory initial transmission line application. As far as WMECO is aware, there are no more recent cases interpreting this element of section 72. In regard to the changes to section 72 adopted by the Legislature in Chapter 249 of the Acts of 2004, these changes would not appear to be of the nature that would alter the conclusion reached by the court in *Boston Edison.*

This concludes WMECO's comments on the Department inquiries. As stated above, WMECO is interested in participating in further steps with the Department to determine when a Section 72 petition is necessary and to determine the appropriate content of such a filing.